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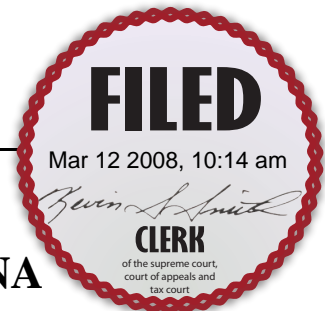
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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA.

Appellant-Plaintiff,

VS.

DEREK HOLLIS and ANTONIO GRAVES,

Appellees-Defendants.

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No. 49A02-0708-CR-745

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Eichholtz, Judge
Cause Nos. 49G23-0701-FD-6486, 49G23-0701-FD-6484

March 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

The State appeals the suppression of evidence Derek Hollis and Antonio Graves¹ committed possession of cocaine.² We reverse and remand.

FACTS AND PROCEDURAL HISTORY

On January 12, 2007, Indianapolis Metropolitan Police Officer Scott Emminger was dispatched to a residence on Walcott Street following an anonymous report. According to the report, a tan or gold vehicle was parked in front of the residence and was occupied by four African-American men, who were selling cocaine and threatening people with guns. Officer Emminger parked his car on a nearby street and walked to an alley adjoining Walcott Street. From the alley, Officer Emminger observed a “tan-ish gold” Ford occupied by three African-American males in front of the residence indicated by the report. (Tr. at 14.) He saw someone approach the vehicle, make a quick hand-to-hand exchange, and walk away. Based on his experience, Officer Emminger believed he had witnessed a sale of drugs.

Officer Emminger returned to his car and radioed Officer Ryan Hancock for assistance. Officer Emminger approached the Ford from the north, while Officer Hancock approached from the south. Officer Emminger activated his lights, stopped near the Ford, and exited his car. As he approached the Ford, he noticed “considerable movement within the vehicle.” (*Id.* at 16.) Specifically, the driver shoved his hands into the front of his pants, and the two passengers appeared to be moving things around. Concerned that the occupants were attempting to reach for or conceal weapons, Officer

¹ These cases were consolidated on appeal.

² Hollis was charged with a Class B felony, Ind. Code § 35-48-4-6(b)(2)(B)(ii), and Graves was charged with a Class D felony. Ind. Code § 35-48-4-6(a).

Emminger drew his gun and instructed Officer Hancock to remove the driver from the car. Officer Hancock opened the driver's door, and Hollis stepped out. Hollis was "squirmy" and moving around in a manner that made the officers uncomfortable. (*Id.* at 18.) Therefore, Officer Hancock pressed Hollis against the vehicle and began a pat down. A clear baggie containing a substance that looked like crack cocaine fell from Hollis' pants leg. Additional drugs and a 9 millimeter gun were found on another passenger.

Hollis and Graves were charged with possession of cocaine as a Class D felony. Hollis moved to suppress evidence, and a hearing was held on June 4, 2007. The trial court concluded the anonymous tip was "meaningless" and Officer Emminger corroborated only "innocent facts," and therefore granted the motion to suppress. (*Id.* at 46-47.) On July 26, 2007, Graves also moved to suppress evidence, and his motion was granted.

DISCUSSION AND DECISION

The State argues the officers' actions complied with both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution, and the suppression of evidence was therefore erroneous. When evaluating the propriety of a stop and frisk, we accept the factual findings of the trial court unless they are clearly erroneous. *State v. Voit*, 679 N.E.2d 1360, 1362 (Ind. Ct. App. 1997).

Findings of fact are clearly erroneous when the record lacks any facts or reasonable inferences to support them. When determining whether the findings are clearly erroneous, we consider only the evidence most favorable to the judgment and the reasonable inferences flowing from that evidence. We will not judge witness credibility or reweigh the evidence.

Id. (citations omitted). The ultimate determination whether reasonable suspicion exists is reviewed *de novo*. *Id.*; *State v. Ritter*, 801 N.E.2d 689, 691 (Ind. Ct. App. 2004).

The facts in this case are not in dispute; therefore, we are presented with a question of law. Although we conduct a separate analysis under the Fourth Amendment and Article 1, Section 11, both require consideration of the totality of the circumstances. The trial court, however, evaluated the tip and the officer's observations in isolation. We conclude that, considering the totality of the circumstances, the officers' conduct complied with both the Fourth Amendment and Art. 1, Section 11.

1. Fourth Amendment

As a general rule, the Fourth Amendment prohibits warrantless searches. *Francis v. State*, 764 N.E.2d 641, 644 (Ind. Ct. App. 2002). Therefore, when a search is conducted without a warrant, the State must prove the search falls within an exception to the warrant requirement. *Id.*

One exception to the warrant requirement was recognized by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In *Terry*, the United States Supreme Court established the rule that a police officer may, without a warrant or probable cause, briefly detain a person for investigatory purposes if, based upon specific and articulable facts together with rational inferences from those facts, "official intrusion upon the constitutionally protected interests" of private citizens is reasonably warranted, and the officer has a reasonable suspicion that criminal activity "may be afoot." *Id.* at 21-22, 30, 88 S.Ct. at 1879-1880, 1884, 20 L.Ed.2d 889.

Id. In evaluating the legality of a *Terry* stop, we consider the totality of the circumstances. *Id.* "The reasonable suspicion requirement is satisfied where the facts known to the officer at the moment of the stop, together with the reasonable inferences

arising from such facts, would cause an ordinarily prudent person to believe that criminal activity has occurred or is about to occur.” *Id.*

An anonymous tip alone seldom gives rise to the reasonable suspicion necessary for a *Terry* stop. “Corroboration is ordinarily necessary where nothing the tipster said shows either reliability or the informant’s basis of knowledge.” *Hardister v. State*, 849 N.E.2d 563, 510 (Ind. 2006). Reasonable suspicion may be based on other facts that establish the reliability or the basis of the informant’s knowledge. *Id.*

The tip in this case provided only the location and description of a vehicle and its passengers, facts that were readily observable by the public. Therefore, we agree the tip, by itself, would not establish reasonable suspicion. However, we do not agree the tip is “meaningless.” (Tr. at 46.) Because we apply a totality of the circumstances test, the tip must be considered in conjunction with Officer Emminger’s observations and experience. Although there were three men, not four, in the car when he responded to the tip, Officer Emminger was able to confirm the rest of the description of the vehicle and its occupants. He observed an exchange that, based on his experience, he believed was a sale of drugs.

Officer Emminger testified he could not see what was exchanged. The defense asked whether the people could have been shaking hands, and the officer responded, “Yes, sir.” (*Id.* at 25.) However, the possibility that the observed conduct has an innocent explanation does not necessarily mean the officer lacks reasonable suspicion for a *Terry* stop. Indeed, the conduct observed by the officer in *Terry* was capable of an innocent explanation. *See* 392 U.S. at 22-23 (upholding stop and frisk of three men who passed by a store several times because officer had reasonable suspicion they were casing

the store). An officer's experience may lead him to conclude that seemingly innocent activity is in fact criminal. *See Edwards v. State*, 682 N.E.2d 800, 805 (Ind. Ct. App. 1997) (combination of confidential tip and observation of brief, hand-to-hand transactions consistent with narcotic transactions established probable cause for a search warrant).

Therefore, we conclude the tip, combined with Officer Emminger's observations and his conclusions based on his experience, would lead a reasonably prudent person to believe criminal activity had occurred. *See id.* Officer Emminger had reasonable suspicion to conduct an investigatory stop, and the furtive movements of the passengers provided additional justification for a pat down. *See Illinois v. Wardlow*, 528 U.S. 119, 119 (2000) ("[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion."). The evidence in dispute was discovered during this *Terry* stop, and the officers did no more than was necessary to confirm or allay their suspicions. Therefore, the evidence was properly obtained under the Fourth Amendment.

2. Article 1, Section 11

Although the language of Article 1, Section 11 is similar to the Fourth Amendment, we conduct a separate analysis that focuses on whether the officer's conduct "was reasonable in light of the totality of the circumstances." *Holder v. State*, 847 N.E.2d 930, 940 (Ind. 2006). In determining reasonableness, we balance: "1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs." *Id.* (quoting *Litchfield v. State*, 824 N.E.2d

356, 361 (Ind. 2005)).

Based on the anonymous tip and his observations, Officer Emminger had reasonable suspicion the defendants were selling drugs. The ensuing stop and frisk was commensurate with his concerns. He investigated the tip and did not approach the vehicle until he had witnessed what he believed was a drug sale. Upon approaching the vehicle, the officers did not draw their weapons or conduct a pat down until they observed furtive movements. Hollis' continued movements after he exited the car justified Officer Hancock's minimal use of force to accomplish the pat down. The furtive movements of the passengers and the presence of drugs found on Hollis justified the search of Graves' person. Because the officers reasonably believed the passengers could be armed, a search was necessary for their safety. Therefore, the search was reasonable under Art. 1, Section 11.

Because the collection of the evidence violated neither the Fourth Amendment nor Art. 1, Section 11, we reverse the trial court's order suppressing the evidence.

Reversed and remanded.

KIRSCH, J., and RILEY, J., concur.